

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM J. ALFANO,
Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social
Security,
Defendant.

No. CV-07-239-CI

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND DIRECTING AN IMMEDIATE
AWARD OF BENEFITS

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 9, 12). Attorney Lora Lee Stover represents Plaintiff; Assistant United States Attorney Frank A. Wilson and Special Assistant United States Attorney Terrye E. Shea represent Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 9) and directs an immediate award of benefits. Defendant's Motion for Summary Judgment (Ct. Rec. 12) is **DENIED**.

JURISDICTION

On August 22, 2003, Plaintiff William Alfano (Plaintiff) filed an application for disability insurance benefits.¹ (Tr. 80-82.)

¹Plaintiff had previously filed an application for benefits in 2000, which the ALJ consolidated with the current application. (Tr.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND DIRECTING AN IMMEDIATE AWARD OF BENEFITS - 1

1 Plaintiff alleged disability due to coronary heart disease, neck
2 injury, glaucoma, and clogged arteries in both legs, with an onset
3 date of August 13, 1999. (Tr. 45, 49, 80.) Benefits were denied
4 initially and on reconsideration. (Tr. 31-32.) Plaintiff requested
5 a hearing before an administrative law judge (ALJ), which was held
6 before ALJ Paul Gaughen on May 24, 2005. (Tr. 534-541.) The ALJ
7 granted Plaintiff's request to continue the hearing so he could
8 obtain counsel. At the hearing on August 9, 2005 (Tr. 544-602),
9 Plaintiff, who was represented by counsel, testified, as did
10 medical expert (ME) Robert A. Stier, M.D., and vocational expert
11 (VE) Daniel R. McKinney. At the hearing, the ALJ stated
12 provisionally that disability appears to be established at least for
13 the period under the rules when the Plaintiff is of advanced age or
14 55 or older. (Tr. 598.) On the date last insured, Plaintiff was 54
15 years old. The ALJ denied benefits and the Appeals Council denied
16 review. (Tr. 7-9, 17-28.) The instant matter is before this court
17 pursuant to 42 U.S.C. § 405(g).

18 **STATEMENT OF FACTS**

19 The facts of the case are set forth in detail in the transcript
20 of proceedings, and are briefly summarized here. Plaintiff was 54
21 years old on his date last insured and 57 at the time of the
22 hearing. He completed high school and one year of college. (Tr.
23 566.) He had past relevant work as a tavern owner and beverage
24 system server. (Tr. 102, 144.)

25 **SEQUENTIAL EVALUATION PROCESS**

26 The Social Security Act (the "Act") defines "disability" as the
27

28 547.)

1 "inability to engage in any substantial gainful activity by reason
2 of any medically determinable physical or mental impairment which
3 can be expected to result in death or which has lasted or can be
4 expected to last for a continuous period of not less than twelve
5 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
6 provides that a Plaintiff shall be determined to be under a
7 disability only if any impairments are of such severity that a
8 Plaintiff is not only unable to do previous work but cannot,
9 considering Plaintiff's age, education and work experiences, engage
10 in any other substantial gainful work which exists in the national
11 economy. 42 U.S.C. §§ 423 (d)(2)(A), 1382c(a)(3)(B). Thus, the
12 definition of disability consists of both medical and vocational
13 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.
14 2001).

15 The Commissioner has established a five-step sequential
16 evaluation process for determining whether a person is disabled. 20
17 C.F.R. §§ 404.520, 416.920. Step one determines if the person is
18 engaged in substantial gainful activities. If so, benefits are
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
20 the decision maker proceeds to step two, which determines whether
21 Plaintiff has a medically severe impairment or combination of
22 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

23 If Plaintiff does not have a severe impairment or combination
24 of impairments, the disability claim is denied. If the impairment
25 is severe, the evaluation proceeds to the third step, which compares
26 Plaintiff's impairment with a number of listed impairments
27 acknowledged by the Commissioner to be so severe as to preclude
28 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),

1 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the
2 impairment meets or equals one of the listed impairments, Plaintiff
3 is conclusively presumed to be disabled. If the impairment is not
4 one conclusively presumed to be disabling, the evaluation proceeds
5 to the fourth step, which determines whether the impairment prevents
6 Plaintiff from performing work which was performed in the past. If
7 a Plaintiff is able to perform previous work, that Plaintiff is
8 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
9 416.920(a)(4)(iv). At this step, Plaintiff's residual functional
10 capacity ("RFC") assessment is considered. If Plaintiff cannot
11 perform this work, the fifth and final step in the process
12 determines whether Plaintiff is able to perform other work in the
13 national economy in view of Plaintiff's residual functional
14 capacity, age, education and past work experience. 20 C.F.R. §§
15 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137
16 (1987).

17 The initial burden of proof rests upon Plaintiff to establish
18 a prima facie case of entitlement to disability benefits. *Rhinehart*
19 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172
20 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once
21 Plaintiff establishes that a physical or mental impairment prevents
22 the performance of previous work. The burden then shifts, at step
23 five, to the Commissioner to show that: (1) Plaintiff can perform
24 other substantial gainful activity; and (2) a "significant number of
25 jobs exist in the national economy" which Plaintiff can perform.
26 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

27 STANDARD OF REVIEW

28 Congress has provided a limited scope of judicial review of a

1 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
2 the Commissioner's decision, made through an ALJ, when the
3 determination is not based on legal error and supported by
4 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
5 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
6 "The [Commissioner's] determination that a plaintiff is not disabled
7 will be upheld if the findings of fact are supported by substantial
8 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
9 (*citing* 42 U.S.C. § 405(g)). Substantial evidence is more than a
10 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th
11 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
12 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of*
13 *Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988).
14 Substantial evidence "means such evidence as a reasonable mind might
15 accept as adequate to support a conclusion." *Richardson v. Perales*,
16 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences
17 and conclusions as the [Commissioner] may reasonably draw from the
18 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,
19 293 (9th Cir. 1965). On review, the court considers the record as
20 a whole, not just the evidence supporting the decision of the
21 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)
22 (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

23 It is the role of the trier of fact, not this court, to resolve
24 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
25 supports more than one rational interpretation, the court may not
26 substitute its judgment for that of the Commissioner. *Tackett*, 180
27 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
28 Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in
2 weighing the evidence and making the decision. *Browner v. Secretary*
3 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).
4 Thus, if there is substantial evidence to support the administrative
5 findings, or if there is conflicting evidence that will support a
6 finding of either disability or nondisability, the finding of the
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229,
8 1230 (9th Cir. 1987).

9 **ADMINISTRATIVE DECISION**

10 At the onset, ALJ Gaughen noted that Plaintiff met the
11 requirements of the Act and is insured for disability insurance
12 benefits through March 31, 2004. (Tr. 18.) At step one, the ALJ
13 found Plaintiff had not engaged in substantial gainful activity
14 during the relevant time. (Tr. 18.) At step two, he found
15 Plaintiff had severe impairments of cardiac impairments, status
16 post-placement of stent in right coronary artery and re-stenosis;
17 atherosclerotic coronary vascular disease, status post-angioplasty;
18 hypertension; hyperlipidemia; and type II diabetes (since April of
19 2003). (Tr. 22.) At step three, he determined these impairments
20 did not meet the requirements of any Listed impairments. (Tr. 22-
21 23.) He found Plaintiff less than completely credible. (Tr. 24,
22 27.) The ALJ found that Plaintiff has the RFC to stand and walk
23 half of a work day with standing for 2 hours at one time, walking
24 for 1 hour at a time, and sitting for 4 hours at a time. (Tr. 25.)
25 At step four, relying on the VE's testimony, the ALJ found that
26 Plaintiff is unable to perform his past relevant work. (Tr. 26.)
27 At step five, the ALJ found Plaintiff can perform other work,
28 including as a packaging and filling machine operator or assembly

1 worker. (Tr. 26.) The ALJ found Plaintiff was, therefore, not
2 under a "disability" as defined by the Social Security Act. (Tr.
3 27-28.)

4 ISSUES

5 The question is whether the ALJ's decision is supported by
6 substantial evidence and free of legal error. Plaintiff argues the
7 ALJ erred at step two by failing to find that his orthopedic
8 impairments are severe and by finding him less than completely
9 credible. (Ct. Rec. 10 at 10-13.) The Commissioner responds that
10 substantial evidence supports both of the ALJ's determinations and
11 there is no legal error. (Ct. Rec. 13 at 9-18.)

12 DISCUSSION

13 A. Step Two - chronic neck pain

14 Plaintiff argues that the ALJ erred at step two by failing to
15 find his orthopedic impairments (chronic neck pain and, more
16 recently, lumbar pain) severe. (Ct. Rec. 10 at 3-7, 10-12.)

17 To satisfy step two's requirement of a severe impairment, the
18 Plaintiff must provide medical evidence consisting of signs,
19 symptoms, and laboratory findings; the claimant's own statement of
20 symptoms alone will not suffice. 20 C.F.R. § 416.908. The effects
21 of all symptoms must be evaluated on the basis of a medically
22 determinable impairment which can be shown to be the cause of the
23 symptoms. 20. C.F.R. § 416.929. The Commissioner has passed
24 regulations which guide dismissal of claims at step two. Those
25 regulations state an impairment may be found to be not severe *only*
26 when evidence establishes a "slight abnormality" on an individual's
27 ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir.
28 1988) (citing Social Security Ruling 85-28). The ALJ must consider

1 the combined effect of all of the claimant's impairments on the
2 ability to function, without regard to whether each alone was
3 sufficiently severe. See 42 U.S.C. § 423(d)(2)(B) (Supp. III 1991).
4 The step two inquiry is a *de minimis* screening device to dispose of
5 groundless or frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137,
6 153-154.

7 Evidence of Plaintiff's orthopedic impairments, specifically
8 his neck pain, includes a cervical spine MRI on January 30, 2003,
9 which was not available at the hearing. (Tr. 502.) The ALJ
10 received the MRI results after the hearing and briefly analyzed it,
11 together with the cervical spine x-ray results: "The claimant was
12 found by x-ray and MRI scan to have only mild to moderate cervical
13 stenosis at C4-5, C5-6, and C6-7." (Tr. 24.)

14 The MRI results reveal:

15 C4-5: Annular bulge is present. Bilateral
16 uncovertebral joint osteophytes are also present. No
17 significant stenosis is present. Mild bilateral neural
18 foraminal narrowing is seen.

19 C5-6: Posterior annular bulge is present along with
20 bilateral uncovertebral joint disease. The combination
21 causes mild canal stenosis and mild bilateral neural
22 foraminal narrowing.

23 C6-7: A broad-based annular bulge is present with a
24 slight right paracentral component. Uncovertebral joint
25 osteophytes and facet joint degenerative changes present
26 causing moderate right and mild left neural foraminal
27 narrowing. There is mild canal stenosis.

28 (Tr. 502.) The cervical spine x-rays, also taken on January 30,
2003, reveal degenerative spondylosis and foraminal encroachment.
(Tr. 504.)

Plaintiff testified that looking up or down causes neck pain.
(Tr. 576.) To relieve the pain, he takes 4 Aleve daily, does
traction at home 20 minutes twice a day, and exercises his neck when

1 seated. (Tr. 576-577.) Two years of intermittent chiropractic care
2 have not relieved Plaintiff's neck pain. (Tr. 574-575.) He is
3 unable to completely turn his neck to the left. (Tr. 575.)
4 Plaintiff feels he might be able to hold his head in a downward
5 looking position for most of the day, but the next day he probably
6 would not be able to turn his head. (Tr. 576.)

7 The ALJ erred by failing to include Plaintiff's orthopedic
8 impairment (neck pain) as a severe impairment at step two. The MRI
9 and x-rays of his cervical spine indicated Plaintiff suffered from
10 moderate right foraminal narrowing. The ALJ mentions the finding
11 but assesses no impairment as a result, noting only that because
12 Plaintiff worked with complaints of chronic neck pain since 1994, it
13 is not a severe impairment. (Tr. 22.) Plaintiff stopped working in
14 November of 1999.

15 Objective testing reveals that the claimed impairment of
16 chronic neck pain and limited mobility is clearly not groundless or
17 frivolous, and likely worsened after 1994. As chronic neck pain has
18 more than a "de minimus" effect on Plaintiff's ability to work, the
19 ALJ erred by failing to include it as a severe impairment at step
20 two.

21 **B. Step two - claudication**

22 The ALJ notes the ME's testimony that Plaintiff suffers from
23 moderate impairment in his legs due to claudication but does not
24 include it as a severe impairment as step two. The ALJ gives no
25 reason for rejecting the impairment and does not include it in the
26 RFC. An overview of Plaintiff's medical history reveals this is
27 error: **(1) Initial heart surgery.** On November 15, 1999 (two days
28

1 after onset), Plaintiff was admitted to the ER after experiencing
2 indigestion for a week; testing revealed coronary artery disease.
3 (Tr. 199.) He was released two days later after James Leggett,
4 M.D., placed a stent in Plaintiff's right coronary artery.
5 Plaintiff was discharged with five prescribed medications. (Tr.
6 199.) **(2) Medication-related gastritis.** On March 27, 2000, Dr.
7 Leggett referred Plaintiff to Georgia Rees-Lui, M.D., for heartburn
8 symptoms. (Tr. 239.) Testing on March 29, 2000, revealed gastritis
9 probably related to taking aspirin. (Tr. 242.) **(3) Second heart**
10 **surgery and additional diagnoses.** Plaintiff was admitted to the ER
11 on March 30, 2000 (four months after onset), with a new onset of
12 exertional pain and a positive stress test. (Tr. 246, 251.) On
13 April 5, 2000, Dr. Leggett performed a complex angioplasty,
14 rotator and stenting of the right coronary artery, inserted a
15 temporary pacemaker and performed an iliofemoral angiography for
16 consideration of percutaneous closure. (Tr. 264.) On June 5, 2000,
17 Dr. Leggett's principal diagnosis was coronary atherosclerosis of
18 native coronary vessel, with secondary diagnoses of unstable
19 angina, unspecified hyperlipidemia, esophageal reflux, and essential
20 hypertension. (Tr. 294.) **(4) Claudication.** Plaintiff first saw
21 Michael Kwasman, M.D., on October 13, 2000. (Tr. 363.) He felt
22 great except for a little pain when walking. (Tr. 363.) On October
23 8, 2001, Dr. Kwasman notes: "He does complain of some leg cramping
24 with exercise as well as some fatigability which is unchanged for
25 him." (Tr. 385.) Plaintiff was referred for an arterial leg scan
26 due to claudication symptoms; tricar was stopped and zicor begun.
27 (Tr. 385.) On October 17, 2001, Michael Hinnen, M.D., opined that
28 test results show Plaintiff has mild to moderate disease of the left

1 internal iliac artery, moderate disease of the left internal iliac
2 artery, mild calf vessel disease is present in the right leg, and
3 there is a mild drop in Plaintiff's post-exercise ankle brachial
4 indices. (Tr. 386.) **(5) Diabetes.** By January 4, 2003, Rolf Panke,
5 D.O./C.A., noted Plaintiff's labs were abnormal and he was newly
6 diagnosed with type II diabetes. (Tr. 439.) On April 15, 2003, Dr.
7 Panke noted Plaintiff had side effects from all statins: Lipitor,
8 Zocor, Lescol and Pravachol. (Tr. 440.) **(6) Third heart surgery.**
9 Plaintiff was again admitted to the ER on June 24, 2003, for
10 increased chest pain. (Tr. 373.) On that date, Lorne Golman, M.D.,
11 performed percutaneous transluminal coronary angioplasty and
12 stenting of the proximal LAD, with a drug-eluting stent, kissing
13 balloon inflation in the LAD and first diagonal branch, and
14 percutaneous transluminal coronary angioplasty of the distal right
15 coronary artery. (Tr. 378.) **(7) Medication.** In October of 2003,
16 more than four years after onset but well before the date last
17 insured, Dr. Panke notes Plaintiff is taking Pravachol, Plavix,
18 Lopid and lisinopril. (Tr. 442.)

19 The ALJ notes medical expert Dr. Stier's opinion that Plaintiff
20 "needs to rest for pain for about 5 minutes because of the
21 claudication." (Tr. 22, referring to Tr. 556.) Dr. Stier opined:

22 He has peripheral vascular disease which probably accounts
23 for his claudication. I think it's legitimate to say that
24 he has a moderate limitation of activity
25 standing, walking, especially walking would be under six
26 to eight hours. It was given as six to eight hours but I
27 think it's gonna be less than that because he has
28 significant disease in his legs. He needs to rest for
pain or to sit down for five minutes at least. He said in
one of his statements, I take sometimes a half an hour.
Usually in people with claudication a short just even
stopping will, will give relief.

1 (Tr. 556.)

2 Despite the ME's opinion, the ALJ does not include claudication
3 as a severe impairment at step two. The RFC includes no requirement
4 of 5 minutes of rest due to pain, and the ALJ gives no reason for
5 rejecting Dr. Stier's opinion. This is error.

6 **C. Credibility**

7 Plaintiff contends that the ALJ erred by finding him less than
8 completely credible and failing to support the finding with "clear
9 and convincing" reasons. (Ct. Rec. 10 at 12-13.) The Commissioner
10 responds that the ALJ's reasons may be drawn from inferences. (Ct.
11 Rec. 13 at 17-18.)

12 "If the claimant produces evidence to meet the *Cotton*² test and
13 there is no evidence of malingering, the ALJ can reject the
14 claimant's testimony about the severity of [his] symptoms only by
15 offering clear and convincing reasons for doing so." *Smolen v.*
16 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). "[A]n ALJ may not reject
17 a claimant's subjective complaints based solely on a lack of medical
18 evidence to fully corroborate the alleged severity of pain." *Burch*
19 *v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).

20 There is no evidence of malingering. Plaintiff is correct that
21 the ALJ did not offer specific, clear, and convincing reasons for
22 rejecting Plaintiff's testimony with respect to neck pain and its
23 resulting limitations. The inferences from the evidence are more
24 consistent with finding Plaintiff credible than not credible.

25 **D. Remand**

26 "When an ALJ's reasons for rejecting the claimant's testimony
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28 ²*Cotton v. Bowen*, 799 F.2d 1403 (9th Cir. 1986).

1 are legally insufficient and it is clear from the record that the
2 ALJ would be required to determine the claimant disabled if he had
3 credited the claimant's testimony, we remand for a calculation of
4 benefits." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007)
5 (internal quotation marks omitted). The VE testified that it would
6 be very difficult for a person who does not have neck flexion more
7 than a third of the day to perform any work. (Tr. 595-597.)
8 Plaintiff indicated neck flexion increases his pain and limits
9 mobility. (Tr. 575-77.) The ME testified that Plaintiff has
10 significant disease in his legs. Objective test results confirm
11 that Plaintiff suffers from moderate cervical stenosis, degenerative
12 spondylosis, foraminal encroachment, and claudication, in addition
13 to the impairments the ALJ found severe: cardiac impairments
14 resulting in the placement and replacement of a right coronary
15 artery stent; atherosclerotic coronary vascular disease, status
16 post-angioplasty; hypertension; hyperlipidemia; and type II
17 diabetes, impairments which can be expected to produce disabling
18 symptoms. (Plaintiff's rotator cuff tear and later repair, as well
19 as removal of a colon tumor, occurred after his date last insured
20 and are not included.) It is clear from the record as a whole,
21 including the testimony of the ME and the VE, that Plaintiff does
22 not have the RFC to perform work at any level.

23 CONCLUSION

24 The ALJ's step two finding and credibility assessment are based
25 on legal error and not supported by substantial evidence.
26 Accordingly,

27 IT IS ORDERED:

28 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is

1 **GRANTED.** This matter is remanded to the Commissioner for an
2 immediate award of benefits.

3 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 12**) is
4 **DENIED.**

5 3. An application for attorney fees may be filed by separate
6 motion.

7 The District Court Executive is directed to file this Order and
8 provide a copy to counsel for Plaintiff and Defendant. Judgment
9 shall be entered for Plaintiff and the file shall be **CLOSED.**

10 DATED March 31, 2008.

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12 S/ CYNTHIA IMBROGNO
13 UNITED STATES MAGISTRATE JUDGE
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